IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

TERRY BELL,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 03-2148-KHV**
BOARD OF COUNTY COMMISSIONERS	)	
OF JEFFERSON COUNTY,	)	
	)	
Defendant.	)	
_____	)	

MEMORANDUM AND ORDER

Terry Bell brings suit under 42 U.S.C. § 1983 against the Board of Commissioners of Jefferson County, Kansas, claiming that the County violated his constitutional rights when it terminated his employment. Plaintiff claims that defendant discharged him in retaliation for his exercise of free speech rights under the First Amendment and deprived him of a property interest in continued employment and a liberty interest in his good name and reputation without procedural due process in violation of the Fourteenth Amendment. On April 19 through 23 and April 26, 2004, plaintiff tried his claims to a jury. This memorandum and order sets forth the Court's findings on various issues of law. Defendant's motion under Fed. R. Civ. P. 50, for judgment as a matter of law, is also pending. For reasons set forth below, defendant's motion is overruled.

Factual Background

The complete factual background of this case is set forth in the Memorandum And Order (Doc. #98) filed March 29, 2004. The Court will not repeat that background here, and sets forth only those factual findings required to determine the legal issues which are before it.

On June 1, 1986, Jefferson County hired Terry Bell as an emergency medical technician for its

Emergency Medical Services ("EMS"). On November 14, 2001, Don Haynes, EMS director, promoted Bell to assistant director of EMS.

In January of 2002, Haynes and EMS employee Janey Gordon responded to a "code blue" medical call at the courthouse. Bell testified that although the patient died, Haynes and Gordon were laughing and giggling and "high-fiving" each other when they returned to the EMS station, talking about what a cool call it had been. Bell expressed to them his concern that they had not followed protocol. He also told Haynes that "we probably as an ambulance service were facing a large malpractice suit if the family wanted to pursue it."

Bell testified that some time after he became assistant EMS director, Haynes began to deliver truckloads of supplies from the EMS stockroom to the Valley Falls Fire Department to help it operate its own ambulance service. According to Bell, Haynes also promised John Gordon, the Fire Chief of Valley Falls, that the County would contribute $8,000.00 from its EMS budget to the Valley Falls Fire Department. Bell discussed this topic with Haynes several times, the last time in July of 2002. Bell told Haynes that the deliveries were against County policy, were unfair to the 11 other fire districts in the County and were a waste of taxpayer money. Bell told Haynes that the promised contribution was a bad idea and probably not legal, and that Haynes should consult the County Counselor.

In March of 2002, EMS hired Tani Ruff. Her duties included billing accounts and performing secretarial duties for Haynes and Bell. In April of 2002, Ruff conducted a training session for EMS employees and other first responders in Jefferson County. The training session addressed the importance of documentation for billings to Medicare and health insurance companies. As an example, Ruff discussed an ambulance transport to the emergency room for a patient who had trouble sleeping. Ruff allegedly said something to the effect that she could take a non-emergency ambulance run and if

she coded it right, turn it into a high paying emergency run. Bell testified that her approach horrified him and that as a result, he told Haynes that he would have no part of Medicare fraud. During the last two weeks of July of 2002, Bell again expressed to Haynes his concern about possible Medicare fraud by Ruff. Bell also told Haynes that because of Ruff's work habits (being late, leaving early, sleeping at her desk, and her dress, attitude and language), and because he could not trust her about the medical billing, he thought they should "let her go" before her six-month probationary period was up.

During the summer of 2002, Bell received information that Haynes had been responding to emergency calls in his County vehicle while under the influence of alcohol. Bell discussed this with Haynes, reminding him that it was against County policy to operate a County vehicle after consuming alcohol.

On July 30, 2002, Haynes met with EMS employees Philip Briney, Tim Dooley, Steve Scott, John Shipley, Janey Gordon and Tani Ruff. They complained that Bell displayed an "abusive" attitude, created tension in the workplace, and called female employees bitches and cunts. All six employees gave Haynes written statements which outlined their concerns, including conduct that had occurred months and even years before the meeting. On August 2, 2002, Haynes prepared a letter to Bell, informing him that he was terminated. The letter stated:

> It has been brought to my attention that there has been more than one incident that you have verbally made several employees fearful of their jobs. On one occurrence you said "that if you said shit they had better start looking for a corner." It has just been reported to me that you now have made a physical threat to an employee. You told this employee "that if they ever did that again that you would kick their ass." This has made for a Hostile [sic] work environment. This cannot and will not be tolerated. Because of your actions towards other employee's [sic] I have no other choice but to end your employment with Jefferson County.

Joint Trial Ex. A at D 00700. On August 2, 2002, Haynes and Oliver met with Bell and told him that his

employment was terminated. Oliver read Haynes' letter of August 2 and gave it to Bell. After the meeting the County placed a copy of the termination letter in Bell's personnel file pursuant to the Handbook provision on "Personnel Records." That policy provided in relevant part:

> Complete records of the employment history of every current and former County employee shall be maintained in an employee personnel file. The employee, designee of the employee, Department Head/Supervisor or their designee, and the County Commissioners shall have access to the personnel files. Access may be granted as legally required or otherwise advisable to courts, representatives of investigatory agencies or third-party payor, etc. The confidentiality of employee records shall be maintained to the extent permitted here. . . . The following documents are to be included in each employee's personnel file: . . . resignation, termination notification with date, grievances with action taken and date, etc.

Defendant's Trial Ex. 403 at D 01014.

On August 7, 2002, pursuant to step one of the County grievance policy, Bell submitted to Haynes a written grievance contesting his termination. On August 22, 2002, Bell filed with the County Commission a "Notification of Request for Grievance Hearing" which contested his termination and refuted the allegations set forth in Haynes' letter of August 2. The Commission referred the requests to the grievance committee comprised of Bob Abel, Annie Landis and Chris Schmeissner. The County Commission gave no direction to the grievance committee as to how to conduct the grievance hearing; it merely directed the grievance committee to consult with County Counselor, Steve Montgomery.

Abel consulted with Montgomery as to how to go forward with the process. Because of the number of pending requests by Bell, Montgomery advised Abel to conduct a pre-grievance conference. At this conference, which occurred on September 6, Abel decided to limit the hearing to eight hours and told Bell that he would have four hours to present his side of the case. Abel decided that if witnesses could not or would not come to the proceedings, the grievance committee would not force them to be

there. Abel required each side to provide questions for witnesses and stated that the committee would ask the questions. The meeting was in the County courthouse and when Bell objected to these decisions, Abel told him that he could do them all a favor and just pay his fee and file his complaint upstairs.

Before the grievance hearing, Bell's attorney gave Abel a list of witnesses he wanted to call and questions for each witness. One witness on Bell's list was Janey Gordon, whose complaint that Bell had threatened to "kick her ass" had been cited in the termination letter of August 2. Abel, however, did not request Gordon's presence at the hearing.

On October 10, 2002, the grievance committee conducted a hearing. Abel instructed the witnesses that they did not have to answer any question which made them uncomfortable. Abel did not ask all questions which plaintiff submitted and he rephrased a number of plaintiff's questions. Abel did not allow Bell to call all of his witnesses, even though they were in the courthouse. Several EMS employees who had lodged complaints against plaintiff, including Gordon and Scott, were not called. Plaintiff therefore had no opportunity to cross-examine them.

Bell testified that during the grievance hearing, he discussed concerns which he had previously expressed to Haynes. These included the facts that (1) Haynes and Gordon had not followed protocol in responding to the "code blue" medical call; (2) Haynes had given County supplies (and proposed giving County funds) to the Valley Falls Fire Department; (3) Ruff had committed Medicare fraud; and (4) Haynes had responded to calls in a County vehicle while under the influence of alcohol.

On October 14, 2002, the grievance committee submitted a one-sentence decision to the Jefferson County Commission. It stated:

> After hearing testimony and reviewing the evidence the grievance committee recommends that the Jefferson County Commission should uphold the decision to terminate Terry Bell.

Joint Trial Ex. B at D 01690.

Abel gave the recommendation to the County Commission during an executive session. Before the executive session, Abel had not discussed Bell's grievance with any of the Commissioners. During the executive session, Abel did not give the Commissioners any information other than what was in the grievance committee's decision, and the Commissioners did not ask any questions. The executive session lasted ten minutes. Bell received a copy of the grievance committee decision after October 14, and the Commission did not give him the opportunity to appear to respond to the grievance committee decision.

Plaintiff asserts the following claims under Section 1983: (1) termination of his employment in retaliation for his exercise of his First Amendment free speech rights; and (2) denial of procedural due process rights under the Fourteenth Amendment in connection with (a) his property interest in continued public employment and (b) his liberty interest in his good name and reputation.

Analysis

I. Final Policymaker

As to each of plaintiff's claims, the County can be liable under Section 1983 only if an official custom or policy caused a violation of plaintiff's constitutional rights, see Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692 (1978); Kentucky v. Graham, 473 U.S. 159, 165 (1985), or an individual with final policymaking authority made the decision which violated plaintiff's constitutional rights. See Pembaur v. City of Cincinnati, 475 U.S. 469, 481-84 (1986) (single decision by official responsible for establishing final policy may give rise to municipal liability); Jantz v. Muci, 976 F.2d 623, 630 (10th Cir. 1992) (same), cert. denied, 508 U.S. 952 (1993); Ledbetter v. City of Topeka, 318 F.3d 1183, 1189 (10th Cir. 2003).

In Pembaur, the Supreme Court held that if an official who possesses final policymaking

authority in a certain area makes a decision – even if it is specific to a particular situation – that decision constitutes municipal policy for purposes of Section 1983. 475 U.S. at 481. Such an act is an act "of the municipality" which the municipality "officially sanctioned or ordered." Id. at 480. "Final policymaking authority" is a legal issue to be determined by the court based on state and local law. City of St. Louis v. Praprotnik, 485 U.S. 112, 124,129-30 (1988) (because civil service commission possessed final authority on personnel decisions, discretionary hiring and firing decisions by subordinate employees did not constitute final policymaking by municipality).

The Tenth Circuit has identified three elements which are useful in determining whether an individual is a "final policymaker": (1) whether the official is meaningfully constrained "by policies not of that official's own making;" (2) whether the official's decision are subject to any meaningful review; and (3) whether the policy decision purportedly made by the official is within the realm of the official's grant of authority. Randle, 69 F.3d at 448 (citing Praprotnik, 485 U.S. at 127), Ware v. Unified Sch. Dist., 902 F.2d 815, 818 (10th Cir. 1990) ("Delegation does not occur when a subordinate's decisions are constrained by policies not of his making or when those decisions are subject to review by the authorized policymaker.").

In order to determine whether an individual or group holds "final policymaking" authority, the Court examines the legal chain of authority. See Jantz v. Muci, 976 F.2d 623, 631 (10th Cir. 1992) (school board not liable for school principal's actions because school board had ultimate legal authority to review decisions involving hiring and firing); Ware, 902 F.2d at 819 (municipality not liable because principal who fired plaintiff was not final policymaker on personnel matters – he was not vested with such authority and any decisions he made were reviewable by school board). Any review procedure or constraints must be meaningful – as opposed to merely hypothetical – in order to strip an official of

"final policymaking" authority. Flanagan v. Munger, 890 F.2d 1557, 1569 (10th Cir. 1989) (official was final policymaker where his discipline decisions were final and any meaningful administrative review was illusory).

Except for employees of independently elected officials, Kansas law places final authority over County personnel decisions in the County's elected board. K.S.A. § 19-101(a); see Bd. of County Comm'rs v. Neilander, 275 Kan. 257, 264-67, 62 P.2d 247 (2003). Based on the evidence in this case, however, the Court finds that the Board of County Commissioners delegated its final policymaking authority to the grievance committee. The grievance committee decided to uphold Haynes' decision to terminate plaintiff's employment, and its decision was not "subject to any meaningful review" by the Board. See Randle, 69 F.3d at 448. Rather, the Board delegated its final decision-making authority to the grievance committee. See Ware, 902 F.2d at 815. In theory the grievance committee recommendation was subject to review by the County Commission, but the evidence at trial established that the Commission had a custom and practice of adopting the recommendations of this and prior grievance committees – without meaningful review. See id. (delegation arises when decision manifests custom or usage of which the entity must have been aware). Further, although the County had promulgated a grievance procedure, the Board gave the grievance committee no guidance on how to conduct the hearing. The grievance committee was solely responsible for devising the procedure to be followed at the grievance hearing. It was not required to present to the County Commission its reasons for upholding the termination, and it did not do so. Therefore, the County Commission delegated its policymaking authority to the grievance committee not only as to procedure but as to substance. Based on the evidence presented at trial, the Court finds that as to each of plaintiff's claims, the grievance committee was the final policymaking authority.

II. First Amendment

In cases alleging retaliatory discharge of a public employee in violation of the First Amendment, the Tenth Circuit applies the following four step-analysis:

> First, we determine whether the public employee's speech touches on a matter of public concern. Connick v. Myers, 461 U.S. 138, 146-47 (1983). Second, if the employee spoke as a citizen on a matter of public concern, we must weigh "the interests of the [employee], as a citizen, in commenting upon matters of public concern" against the State's interest "as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568. Third, if the employee's speech interests outweigh the [employer's] efficiency interests, the plaintiff must prove the protected speech was a motivating factor in his or her termination. Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 287 (1977). Finally, if the plaintiff makes the required showing, the burden then shifts to the defendant, who must show by a preponderance of the evidence it would have reached the same employment decision in the absence of the protected activity. Id. The first two steps must be resolved by the court; the last two steps are ordinarily questions for the trier of fact. Melton v. City of Oklahoma City, 879 F.2d 706, 713 (10th Cir. 1989); Wulf v. City of Wichita, 883 F.2d 842, 856-57 (10th Cir. 1989).

Thus, the Court must address two questions: whether plaintiff's speech touches on a matter of public concern and if so, whether the interests of plaintiff outweigh those of the County.

A. Matters Of Public Concern

Speech on matters of public concern generally relate to "any matter of political, social, or other concern to the community," rather than a matter of mere personal interest to the speaker. Connick, 461 U.S. at 146. For example, speech disclosing governmental wrongdoing or misconduct is generally of public concern. See, e.g., Walter v. Morton, 33 F.3d 1240, 1243 (10th Cir. 1994); Wulf v. City of Wichita, 883 F.2d 842, 857 (10th Cir. 1989). Whether an employee's speech addresses a matter of public concern "must be determined by the content, form, and context of a given statement, as revealed by the whole record." Connick, 461 U.S. at 146.

Plaintiff's speech – if he indeed made it – consisted of concerns about the response of Don Haynes

and Janey Gordon to the "code blue" medical call, Haynes' proposal to donate County funds and supplies to the Valley Falls Fire Department, potential medicare fraud by Tani Ruff, and Haynes' use of a County vehicle while under the influence of alcohol. Such speech undoubtedly involves a matter of public concern. See Koch v. Hutchinson, 847 F.2d 1436, 1445-46 (10th Cir. 1988) (en banc) (speech which discloses evidence of corruption or impropriety on part of official concerns matter of public import).

B. Pickering Balancing Test

Under Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968), the Court must determine whether plaintiff's interest in commenting upon matters of public concern was greater than the Board's interest in promoting the efficiency of public services it performed through its employees. Balancing the competing interests of the employee and the government requires consideration of the time, place and manner of the employee's expression. Connick, 46 1 U.S. at 152-53. Specific considerations relative to defendant's interest include "whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." Wulf, 883 F.2d at 856. Once an employee's speech is determined to touch on a matter of public concern, the discharge can be legitimate only if the government's interest outweighs that of the speaker.

Here, defendant produced no evidence that plaintiff's statements on the four areas of public concern impaired discipline by superiors or interfered with harmony among coworkers, had a negative impact on working relationships requiring loyalty and confidence, impeded performance of plaintiff's duties or interfered with the regular operation of the County EMS. The Court therefore concludes that plaintiff's

First Amendment interest outweighed defendant's interest in promoting the efficiency of public services that it performed through its employees.

III. Procedural Due Process

Procedural due process must accompany the deprivation of an established property or liberty interest. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 569 (1972). In regard to plaintiff's claims that the County deprived him of his legitimate claim to continued employment without due process, the Court must determine what process was due. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Matthews v. Eldridge, 424 U.S. 319, 333 (1976) (further quotation omitted). Where, as here, a plaintiff has a property interest in his position, he is entitled to notice, representation by an attorney, an unbiased tribunal and the right to cross-examine witnesses. See Miller v. City of Mission, 705 F.2d 368, 372 (10th Cir. 1983).

IV. Liberty Interest

Finally, plaintiff claims that defendant denied his procedural due process right to a hearing to protect his good name and reputation, in violation of the Fourteenth Amendment of the Constitution. In order to set forth a claim for a due process liberty interest, plaintiff must show that defendant's statement was stigmatizing to him. Whether a statement is stigmatizing is a question of law for the Court. Melton v. City of Okla., 928 F.2d 920, 926-27 (10th Cir. 1991). In this case, the Court finds that one passage in Haynes' termination letter was stigmatizing: "you have now made a physical threat to an employee . . .. This has made for a hostile work environment." This statement impugned plaintiff's good name and reputation as a supervisor. The Court finds that this statement was stigmatizing. Eg., Garcia v. Bd. of Educ., 777 F.2d 1403, 1419-20 (10th Cir. 1985) (claims that plaintiff caused low staff morale and was difficult to work with stigmatizing); Miller, 705 F.2d at 373 (charges that police

department morale was very low and that officers did not respect the Chief and Assistant Chief were stigmatizing).

V. Motion For Judgment As A Matter Of Law

At the close of plaintiff's evidence and again at the close of all evidence at trial, defendant moved for judgment as a matter of law under Rule 50(a), Fed. R. Civ. P., on plaintiff's claim that defendant deprived him of procedural due process as to his liberty interest in his good name. Specifically, defendant argued that plaintiff had not produced evidence that defendant published the stigmatizing statement. In order to establish publication, plaintiff relied upon evidence that the County placed Haynes' termination letter in plaintiff's personnel file. Pursuant to the County Handbook, County Commissioners and department heads have access to the personnel files, and access may be granted as legally required to others – including courts, investigatory agencies and third party payors. The Tenth Circuit has suggested that placing a letter in an employee file may constitute publication. In Bailey v. Kirk, 777 F.2d 567 (10th Cir. 1985) the Tenth Circuit stated in dicta as follows:

> Courts have held that the presence of false and defamatory information in an employee's personnel file may constitute "publication" if not restricted for internal use. See . . . Doe v. United States Civil Service Commission, 483 F. Supp. 539, 570-71 (S.D.N.Y. 1980) (derogatory statements in plaintiff's files were sufficient to demonstrate publication because they were "memoralized in an official . . . report that could be relied upon by the [employer] or another federal agency in the event that [plaintiff] reapplie[d] for a fellowship or [sought] another high level government position.

Id. Based on this statement, the Court believes that the Tenth Circuit would hold that placement of Haynes' letter in plaintiff's personnel file constituted publication. In its Rule 50 motion, defendant argues that the pretrial order did not include a procedural due process/liberty interest claim based on the letter. In response to defendant's motion for summary judgment, however, plaintiff relied upon the letter

for his procedural due process/liberty interest claim. In reply, defendant did not suggest that the pretrial order did not contain a claim based on the letter, but focused on the question whether placing the letter in the employee file was publication. This issue was thus tried to the jury by agreement of the parties. The Court therefore finds that defendant's motion for judgment as a matter of law should be overruled.

IT IS THEREFORE ORDERED that defendant's oral motion for judgment as a matter of law under Rule 50, Fed. R. Civ. P. be and hereby is **OVERRULED**.

Dated this 10th day of May, 2004 at Kansas City, Kansas.

s/Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge